

Estate Planning: Good-bye to Wills, Trusts, and Future Interests

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I. INTRODUCTION

The conventional law on the devolution of private wealth—the law of property, trusts, wills, future interests, and administration of estates—presupposes acquisition of property (through work, gift, inheritance, theft, or chance) and its accumulation, conservation, taxation, and transmission from generation to generation, almost exclusively within the family. Favored objects of gratuitous transfers during the lifetime of the donor and at his death are the spouse, children, parents, other relatives, and (to a limited extent) charity.

Some groups within the population who are politically and economically important have minimal interest in the private wealth transmission process because they have little wealth and cannot accumulate it in significant quantities. The law permits any person of sufficient age having “testamentary capacity” to execute a will, irrespective of whether he has property or a reasonable expectation of acquiring property. But it is the decedent leaving a “net probate estate” who engages our attention. Even if we acknowledge difficulties in separating the “working class” from the “middle class,”¹ it is the middle class and the rich who have a principal interest in the law of property, trusts, wills, future interests, administration of estates, and death taxes.

If it is true that the poor will always be with us, it might also be true that the rich will always be with us. If so, we can be reasonably confident that some part of the population, however small, will continue to use traditional property devices (for example, trusts with class gifts and powers of appointment) to direct the devolution of wealth from generation to generation. But what of that much more numerous group—the “middle class” or the “well-to-do”? What is happening to them and their families in the last quarter of the twentieth century that affects their desire and ability to acquire, accumulate, and conserve wealth that might be transmitted during life or at death? What is happening to the legal doctrines and the legal devices that they have traditionally used to transfer wealth? How are they affected by emerging forms of property, and by taxation, inflation, and demographic change?

II. THE FAMILY²

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1. See Heilbroner, *Middle-Class Myths, Middle-Class Realities*, THE ATLANTIC, Oct. 1976, at 37.

2. See generally Mead, *Can the American Family Survive?*, REDBOOK, Feb. 1977, at 91; *Saving the Family*, NEWSWEEK, May 15, 1978, at 63.

A. *The Self-Sufficient Spouse*

One observable change in the family is that the surviving spouse may be self-supporting at the death of his or her mate. Since World War II women have entered the work force in ever increasing numbers, and many women in the work force are married. The conventional view of the widow of middle age cast adrift without skills on the death of her husband still applies, of course, to numerous cases, but it is becoming less valid than it was in the first half of this century. When both husband and wife are employed over an appreciable period of time, it is possible that both might feel obligated to acquire and accumulate wealth in order to leave to the survivor of the marriage property sufficient for comfortable support without the necessity of continuing employment. But it is also possible that if employment during the customary working years becomes the norm for both partners to a marriage, the obligation to provide for the survivor will be less keenly felt.³

B. *The Absent Spouse*

When only one of the marriage partners is employed, the nature of his or her employment may require temporary absences from the home that put a strain on the marriage. That strain is increased when better "career opportunities" permit and at times require (as a result of employer pressure) a change of domicile that is a wrench to both spouse and children.⁴ If both husband and wife are employed, the frequency of employment-related family disruptions increases. Circumstances may require maintaining two households—one where the husband works and one where the wife works.⁵ Such physical separation might make the heart grow fonder, with a corresponding desire to afford comfortable support for a surviving spouse. On the other hand, it might simply reinforce a disinclination to accumulate wealth to leave to one who has been self-sufficient throughout the marriage.

C. *Successive Marriages*

Successive marriages, whether originating in divorce or in death, have always complicated the property arrangements of some families. But "no fault" divorce statutes are now common, and within all age groups in the married population, divorce has increased in frequency.⁶ Marriage tends

3. If perceptions of diminished obligation to the spouse exist generally, or if they exist with respect to particular kinds of marriages, such as companionate marriages of the elderly, these perceptions may ultimately be reflected in the revision of "forced share" statutes in common-law states. See 5 PAGE ON THE LAW OF WILLS § 47.38 (W. Bowe & D. Parker eds. 1962).

4. Employee resistance to relocation is said to be increasing. See *Mobile Society Puts Down Roots*, TIME, June 12, 1978, at 73.

5. Widner, *Ties That Bind Are Stretching*, Columbus Dispatch, Oct. 15, 1978, § J at 1, col. 1.

6. See BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1977, at 52 (1977). It is commonly reported that one out of three marriages ends in divorce.

to be viewed as tentative; if it does not work out, the tendency is to escape the unsatisfactory union and try again. The stigma associated with divorce has almost disappeared, and in some connections, divorce is irrelevant. If, in this context, a marriage is viewed as experimental, it is likely that the motive to provide for a surviving spouse is diminished.

The matter of successive marriages originating in divorce aside, there are successive marriages that occur in a different context. The average life span in the United States has been increasing. If the marriage of an aging couple survives incompatibility, it will nevertheless be ended at some time by death. The survivor of the couple may live on for years—literally “alone”—unless a new marriage can be entered into. Although an aging widow or widower might indeed find companionship with children and grandchildren, “moving in” with the next younger generation is not viewed as the solution to the economic, social, and emotional needs of older Americans. Increasingly, the old find companionship with their own kind or they do not find it at all, and companionship of the old frequently leads to marriage.

In these companionate marriages, motive to provide for the survivor is not merely weak; it is frequently (and often candidly) altogether absent. Each of the partners to the marriage may be economically self-sufficient. Each may have a family (or families) originating in prior marriages. Though affection for the newly acquired spouse may indeed be deep, it is often insufficient to make him or her a favored object of substantial lifetime or deathtime gifts. Such gifts are reserved for relatives by blood. Under these circumstances, execution of the antenuptial property agreement equals in importance the performance of the marriage ceremony itself. Such agreements are essentially Winding-Up Business Partnership Agreements, with an explicit provision that the first of the partners to withdraw takes nothing.

D. *Termination of the Parent-Child Relationship*

Successive marriages among the young, regardless of cause, frequently result in “his” (or “her”) children, “my” children, and “our” children. Because the infant mortality rate in the United States is relatively low, children of successive marriages are likely to survive dissolution of the marriages that produce them. But a child’s survival of the dissolution of the marriage that produced him does not assure him a continuing connection with his parents. The child may be in effect rejected by both parents. If not rejected by both, he may in the long run be rejected by one, and in that event, may or may not formally enter the family of a step-parent through adoption. In short, successive marriages may effectively cut off a parent from one or more of his children. To the extent that a child becomes a stranger to his natural parent, the desire of the parent to provide for the child diminishes. Eventually, the desire ceases altogether, though it might be revived by the preference for the blood line that permeates all gratuitous transfers, and appears to be particularly strong at death.

E. *Erosion of the Parent-Child Relationship*

1. *Children's Rights*

This is a time of rights—the rights of those accused of crime, of prisoners, of minorities, of women, of the mentally disabled, of the physically handicapped, of the aged, of the terminally ill—and of children.⁷ The unborn have not fared well in this connection, the development of rights for them having been subordinated to a new-found constitutional right to privacy.⁸

Parents who would in any event try to assure a formal education to their children seldom think twice about the state's insistence upon learning to read and write. But parents who would give to their children as much privacy as possible consistent with family living might stop short of assuring their minor daughter a right to procure an abortion without their consent.⁹ Children's rights are thus established at the expense of parents and teachers. Parents deprived by law of control over their children to an extent that parents believe to be unjustified might sensibly demand that the deprivation of authority be accompanied by a corresponding reduction in obligation.

If the development of children's rights results in both frequent assertion of such rights and a corresponding diminution in the felt obligation of parents to support their children, then irrespective of the rationality of parents' attitudes toward children's rights, there is likely to be a diminution in the felt obligation to provide for support of children through the more traditional legal devices (for example, life insurance, trusts, and wills) after a parent's death. Any felt obligation is, of course, irrelevant with respect to newer wealth transmission devices such as Social Security, under which the "covered" taxpayer's choice of "beneficiaries" has been made for him by Congress.

2. *Custodial Care of Children*

Parents from rich families and parents from "working poor" families in the United States frequently share a common characteristic: they do not raise their children. Rich parents delegate this sometimes disagreeable task to surrogate parents, persons often conveniently removed from the immediate geographical area. In a similar fashion, generations of mothers forced by poverty to enter the work force have entrusted the care of their small children to relatives and friends, to older children within the family, and to the streets.

Parents separated from their children by choice or by necessity can

7. See generally Hafen, *Puberty, Privacy, and Protection: The Risks of Children's Rights*, 63 A.B.A.J. 1383 (1977).

8. *Roe v. Wade*, 410 U.S. 113 (1973).

9. *Bellotti v. Baird*, 428 U.S. 132 (1976).

and do maintain affectionate ties, but the threats to family integrity posed by separation require no elaborate documentation. Children of the rich whose parents shunt them aside may reciprocate with bitterness, and children of the poor separated by necessity from their parents may, justifiably, feel cheated.

This unsatisfactory pattern of child-raising among some families might become the norm. Many married women work from necessity, others from choice. And many working women (married or unmarried) are mothers of infants, or children of school age.

What happens during the working day (or night) to these children from "nuclear" families (consisting simply of parents and children), as opposed to "extended" families (including grandparents, uncles, and aunts)? Some, of course, are in school. Others are turned over to custodians ("sitters" in the home, "day-care centers"¹⁰ outside the home). There is naturally a great variation in the quality of custodial care given to these children (just as there is great variation in the quality of custodial care given to other readily identifiable segments of the population), but it is at least doubtful that the best custodial care of infants and children matches in quality the care given to them by attentive parents.

Transmission of private wealth from generation to generation occurs almost exclusively within families (the gift to charity still being the exception and not the rule). Affection of a parent for his child motivates accumulation of wealth for the benefit of the child, and affection of a child for his parent motivates a child to contribute to the support of his parent if that need arises. To the extent that custodial arrangements for the care of infants and children diminish affection between parents and children, motive in either generation to provide for the other is adversely affected.

3. *Rise of Family Specialists*

When factory production displaced handicraft production, non-agricultural families ceased to be together during the day. The father, in particular, is absent from the home, sometimes for several days at a time, and the brunt of what is now called "parenting" falls on the mother (unless she, too, has joined the work force). The task of raising children, whether by both parents or but one, has been alleviated by the rise of family specialists.

Metropolitan areas abound in psychiatrists, psychologists, social workers, and family counselors, all of whom attempt to assist in the resolution of problems that once were solved principally by parents (if solved at all). Sometimes these family specialists are employed on a regular or consulting basis by schools and family aid agencies.

To the extent that family specialists are successful in resolving

10. See generally Ling, *Baby Sitting Is Big Business*, FORBES, July 24, 1978, at 80; *Making Millions by Baby-Sitting*, TIME, July 3, 1978, at 65.

difficulties that disrupt families, it is arguable that they build family solidarity and indirectly encourage intra-family gratuitous transfers. But it can at least be hypothesized that family specialists have contributed to the disintegration of the family by unnecessarily taking on functions that should be performed by parents.¹¹

F. *Prevalence of and Separation from Grandparents*

Advancements in the control of the more insidious diseases, a general rise in the standard of living, and the slow but steady elimination of "killing" jobs assure to most Americans now alive a comparatively long life span, certainly of a length sufficient to qualify many for the role of grandparent. Unless the divorce of a child's parents cuts the child off from a set of his natural grandparents, he is likely to have a complete array, particularly if he is among the older children in his family.

Will such grandparents be geographically close to their children and grandchildren? Will such grandparents be supported wholly or in part by their children?

As indicated above in connection with the changing role of the wife, mobility is a characteristic of American family life. During infancy, children may move frequently with their parents as employment opportunities arise or dictate, and such moves frequently deprive grandparents of regular contact with their grandchildren.

As children approach maturity, the lives of their parents may achieve geographical stability as the "testing" period for an employed parent draws to a close. But with respect to the proximity of grandparents, this stability of parents might be more than offset by a desire of retired grandparents to seek permanent residence in the "Sunbelt" states. At a time when the extended family could realistically be together (if that is an objective), separation might thus continue.

Suppose grandparents prefer proximity to children and grandchildren? Can they expect to achieve it merely by occupying a dwelling with them and taking meals in common? An idealized view of a venerated grandparent with a "special place" in the family is familiar. But we simply do not know the extent to which that idealization has mirrored reality in the past. There is evidence that the grandparents of today and hereafter should not assume that the idealization is likely to be attained with any high degree of frequency. Grandparents' desire for a home in common might be shared by their young grandchildren, but the middle generation that would be most directly affected by such a living arrangement does not generally view this proximity as part of a "fulfilling" lifestyle.

In sum, unless living patterns change, grandparents and grandchildren are likely to lead lives of separation. To the extent that gratuitous

11. See C. LASCH, *HAVEN IN A HEARTLESS WORLD* 171-78 (1977).

transfers turn on establishing and maintaining close family ties, influences militating against the creation of extended families diminish the frequency and quantity of intra-family gifts.

III. THE CONTEMPORARY WEALTH TRANSMISSION PROCESS

A. *Taught Law and Legal Doctrine*

What is happening to the law of property, trusts, wills, future interests, and administration of estates? What are the implications of the trends?

The courses of instruction offered in law schools originate in attempts to achieve logical differentiation, adherence to tradition, and agreement among those perceived to be principally affected by the curriculum (including teachers). For years law schools offered distinct courses in trusts, wills, future interests, and administration of estates. There was, inevitably, some overlap in these courses. For example, future interests (including powers of appointment) are important features of the family trust. Administration of estates at times requires inquiry into the kinds of interests created by the testator, with important decisions on whether to give a beneficiary possession, and, if so, under what conditions.

Partly in response to a desire for efficiency, and partly in response to the necessity for accommodating new, important courses in the curriculum (for example, labor law and taxation), traditional property courses have been compressed into fewer classroom hours (with correspondingly less course credit) and combined into fewer offerings, or both. There is nothing extraordinary in this. After all, there were once law school courses in bailments and carriers, and in the more superb law school library collections there are treatises on dilapidations and forestalling (both being of sufficient interest at some time to encourage publication). Property law that is not taught in schools or that is not encountered in life with sufficient frequency to give it vitality (whether taught or not) finally ceases to be law at all. It is no accident that "unborn widow" perpetuities problems¹² go unnoticed by probate and estates lawyers.

As less of traditional property law is taught, new property notions become part of taught law: workmen's compensation rights, unemployment compensation rights, Social Security rights, pension rights, welfare rights, and so on. New forms of property do not necessarily have the attributes of the more traditional forms. For example, new forms may be less transferable, either voluntarily or involuntarily. Nonetheless (and as one might expect), new forms of property carry both the benefit and the

12. A devises "to B for life, then to B's widow for life, remainder to B's children then surviving." B survives A. The gift to the children is void *ab initio* under the Rule Against Perpetuities in orthodox form because B's widow might be a person unborn at A's death. R. LYNN, *THE MODERN RULE AGAINST PERPETUITIES* 58-59 (1966).

burden of conventional terminology. For example, a purpose¹³ of the Pension Reform Act of 1974¹⁴ (known as the Employee Retirement Income Security Act or ERISA) was to assure "early vesting" of private pension rights. The exegesis of "early vesting" appeared with the development of the destructibility rule—a rule of property that exists in just a few American jurisdictions today. Even so, one with a "vested right" in property certainly has at a minimum an emotional edge on a competing claimant whose right is merely "contingent."

State law has sporadically accommodated itself to development of new property devices and to shifts in forms of property. For example, statute facilitates the use of will substitutes, such as "Totten" trusts. Statute routinely exempts pension trusts from restrictive rules of property. And, as the tax bite looms ever larger, states adopt statutes intended to assure their residents any benefits made available to federal taxpayers from the periodic tinkering with the Internal Revenue Code. Improvement of traditional property law is also an ongoing process: witness the drafting and adoption of the Uniform Probate Code.

The law of property, then, is still very much alive. The familiar words "vested," "contingent," and "alienable" are still very much in use. But some property doctrines are simply dying out. Although "ancestral property"¹⁵ is still sensibly mentioned to law students, it is of no interest to the lawyer representing the retired employee whose pension benefit has been destroyed through pension fund mismanagement, and who must now look to the Pension Benefit Guaranty Corporation for relief, if indeed he is fortunate enough to fall under its shelter. Property law is with us, but it is not the property law of nineteenth-century America; the context of property doctrine has shifted remarkably in just one generation.

B. *The Wealth Transmission Process*

With respect to those who do transmit property to dependents and successors, what are the devices used to carry out transmission? Many still use traditional devices—the will and the trust. But to a perceptibly increasing extent, wealth now is transmitted by contractual devices, or by traditional property devices that have been adapted to the contemporary emphasis on "avoiding probate," transmission by groups, and property management by professionals.

13. 29 U.S.C. § 1001(a) (Supp. V 1975).

14. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001-1381 (1974)).

15. Under the doctrine of "ancestral property" (rarely a part of modern law), inherited property owned by an intestate decedent passes only to such collaterals as are of the "blood of the first purchaser." A. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY 249 (2d ed. 1969). Ohio's "half-and-half" statute, Ohio Revised Code § 2105.10, repealed in 1975, encompassed a somewhat similar notion.

1. *Life Insurance*

Insuring one's life as a means of providing for dependents and successors is not a new idea. But the prevalence of group life insurance as an incident to employment assures an "estate" to many who would otherwise leave nothing at death. The proceeds of such insurance seldom pass through the estate of the life insured to be administered by the probate court (although the proceeds might indeed be part of the estate of the life insured for death tax purposes).

2. *Bank Arrangements*

Banks have created a number of highly popular account arrangements based on the joint tenancy at common law, the third-party beneficiary contract, and the trust; these are, respectively, the "joint" account with the incident of survivorship, the "pay on death" bank account, and the "Totten" trust. Banks service the sale of United States Savings Bonds registered in forms that include "co-ownership" and "pay on death" forms. Again, these devices are intended to avoid probate (and they often do), but they may be subject to claims of a surviving spouse under forced share statutes, and they carry no federal estate tax advantage. "Custodial" accounts that are a feature of Gifts to Minors Acts¹⁶ facilitate both lifetime and testamentary transfers to minors.

3. *Pensions*

"Pension" plans (other than Social Security), whether funded or unfunded, whether governmental or "private," cover many employees. Some funded plans are "insured" (so that the investment of accumulated funds is carried out by insurers) and some are "trusteed" (so that investment is carried out principally, though not exclusively, by bankers). Benefits payable under pension plans go to the covered employee himself (the "participant") upon his disability or retirement, and frequently to his dependents. Benefits payable under pension plans are seldom a part of the participant's probate estate, and under some circumstances they escape death taxes.

Wealth transmitted under pension plans differs from wealth transmitted in more traditional ways in that benefits tend to be channelled to members of the immediate family. For example, under the Pension Reform Act of 1974, a married participant in a pension plan falling under the Act is presumed on retirement to select a joint and survivor retirement benefit (covering both the participant and his spouse) unless he intentionally chooses otherwise.¹⁷

To put the self-employed and employees not covered by pension plans

16. *E.g.*, OHIO REV. CODE ANN. §§ 1339.31-.39 (Page 1962 & 1977 Supp.).

17. 29 U.S.C. 1055 (Supp. 1975). *See generally* I.R.C. § 401(a)(11)(A).

on a rough parity with participants in tax-"qualified" pension plans, Congress created "Keogh" plans and "Individual Retirement Accounts." The tax advantages of these two devices parallel those of the older, more familiar employee pension plans.

4. *Medical Benefits*

"Health care" plans evolved along with pension plans. The variety of health care plans mirrors the variety of pension plans. The growth of these plans for the benefit of the working population, whether sponsored by business employers, by unions, or by governments-as-employers, was paralleled by the creation of Medicare and Medicaid for the dependent nonworking population.

Although experience with health care plans has been far from satisfactory, the tendencies are to expand the categories of disorders "covered," and to extend benefits to additional categories of beneficiaries. These tendencies may find further expression in the adoption of national health insurance.

Participation in pension plans blunts the desire to accumulate wealth for disposition during retirement years. Similarly, participation (or expectation of participation) in health care plans blunts the inclination to set aside funds to meet medical expenses during both working years and retirement years.

5. *Charity*

It is occasionally remarked that charity is "big business" in the United States. Americans are generous in sharing their wealth with the less fortunate, both at home and all over the world.¹⁸ This continuing private generosity tends to obscure public developments during the last half century with respect to aiding the poor and the afflicted, improving health, and supporting education.

First, and of fundamental importance, is the shift from quasi-public institutional arrangements (charitable trusts and foundations, religious and educational groups) to governmental arrangements for identifying nonreligious charitable needs and affording support through expenditure of general revenues raised principally by the federal income tax. Annual expenditures by the Department of Health, Education, and Welfare account for an ever increasing share of the federal budget.

Second, as government established its dominance in dispensing "welfare," charitable trusts and foundations have tended to abandon traditional charitable activities and have shifted to encouraging studies of contemporary life, and to supporting nongovernmental alternatives to

18. See COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, *GIVING IN AMERICA* 53-75 (1975).

governmental intervention into everyday life.¹⁹ Charitable trusts and foundations have become important, influential elements of the "third sector"²⁰ that complements the public and private sectors of society.

6. *Ownership in Common*

Ownership in common of some kinds of property is taken for granted by Americans. The public square with its array of buildings, sculptures, and plazas is just as familiar as the privately owned single-family detached dwelling. "Free" access to highways, roads, parks, lakes, and rivers is seldom debated, and sometimes simply not realistically debatable. Art galleries, sports arenas, and battlefields are all owned by the public, or by quasi-public charitable trusts and foundations. We treasure private property, but we have always, in some way, supported some ownership in common.

Despite sporadic efforts by government (particularly the federal government) to divest itself of land holdings, ownership in common is likely to increase, not decrease. The knowledge that both our natural and our man-made environment is a part of our heritage is no longer confined to a few eccentrics. Despite the persistence of reasonable differences over what constitutes our common heritage and how we should preserve it for our successors, a genuine public concern for wildlife conservation, historical preservation,²¹ restoration of residential neighborhoods,²² and acquisition of scenic easements and the like, is unmistakable. Old buildings are being rescued from imminent demolition and "recycled" for contemporary use.²³ Natural areas suitable for recreation are being identified and acquired or set aside for public use.²⁴ We are learning that "quality of life" is desirable not only for our physical health, but also for our peace of mind.

As we identify and conserve elements of our common heritage, distinctions between "private" and "public" ownership become less distinct. It is neither politically popular²⁵ nor economically feasible to extend outright government acquisition much further than it is today. Therefore, to achieve common ownership of parts of our common heritage, some aspects of private ownership are being attenuated, and this

19. See COMMISSION ON FOUNDATIONS AND PRIVATE PHILANTHROPY, FOUNDATIONS, PRIVATE GIVING, AND PUBLIC POLICY 13-16 (1970).

20. Rockefeller, *The Third Sector, ACROSS THE BOARD*, Mar. 1978, at 13; Simon & Hansmann, *The Role of the Non-Profit Corporation*, YALE ALUMNI MAGAZINE, Apr. 1978, at 42.

21. See *Saving a Station: Grand Central Wins in Court*, TIME, July 10, 1978, at 26.

22. See *New Respect for Old Neighborhoods*, U.S. NEWS & WORLD REP., Aug. 7, 1978, at 44; McQuade, *Two Cities New and Old Show the Way to Urban Amenity*, FORTUNE, July 1975, at 92.

23. See *Landmarks That Work*, NEWSWEEK, June 19, 1978, at 63; Kay, *The Recycling of Boston*, SATURDAY REV., Feb. 5, 1977, at 38.

24. *A Well-Kept Secret: Nation's 50 New Parks*, U.S. NEWS & WORLD REP., June 5, 1978, at

25. Witness the recent controversy over the Alaska National Interest Lands Conservation Act. N.Y. Times, June 19, 1978, § 11, at 4, col. 1.

attenuation becomes public property. The owner of a structure in a residential area might, for example, find himself with the right to maintain and to modify, but without the right to destroy.

To the extent that we are able to extend ownership in common in a sensible and generally acceptable way, we affect the desire to acquire and transmit property privately. A "nature preserve" accessible to many serves much the same purpose as the privately owned "rural retreat" or "second home" (and at less cost per person to those who enjoy it). Public ownership of property will not displace private ownership, but both notions are undergoing refinement, and the refinement will affect the law of property, wills, trusts, future interests, and administration of estates.

7. *Persistence of the Familiar*

Shifting to new forms of property does not eliminate familiar problems. Thirty years ago the divorcing wife in a common law state might sensibly seek the family home when working out an appropriate property settlement. The divorcing wife of the 1980s will also seek a share of her husband's pension rights.²⁶

The shift to new property devices and new forms of property does not eliminate either the need for or the persistence of "experts" and functionaries. On the contrary, they have multiplied many times. Lawyers, accountants, insurers, actuaries, bankers, and investment advisors are complemented by an army of bureaucrats engaged in assembling information, assessing claims, investigating abuses, and distributing "benefits."²⁷ From top to bottom, all these persons have a stake in complexity and confusion—their livelihoods depend on it. The expert on the contingent remainder has been displaced by the expert on tax planning.

IV. THE CONTEXT OF WEALTH TRANSMISSION

A. *Taxes, Income Transfers, and Inflation*

Although income levels in the United States have risen since World War II, rising incomes have been accompanied by higher expectations of what constitutes "happiness," by greater demands for governmental services (with consequent imposition of higher taxes), and by inflation.

Persons already retired who are dependent on fixed-dollar pension benefits find them less and less adequate as prices for food and shelter rise. An employer touting a proposed retirement plan may encounter prospective participants who are skeptical of pension promises because of the unsatisfactory pension experience of a parent, other relative, or

26. In community property states, pension rights accruing during marriage are community property. See W. DEFUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* § 68 (2d ed. 1971).

27. See, e.g., *The Beneficent Monster*, TIME, June 12, 1978, at 24 (Department of Health, Education and Welfare); Bethell, *The Wealth of Washington*, HARPER'S, June 1978, at 41 (federal pay scales).

acquaintance. Even a skilled acquirer and dedicated accumulator of wealth may find that his inclination to conserve wealth for his own retirement and for transmission to dependents and successors is affected by the inability of his investments to keep abreast of inflation.

To the extent that one spends more on consumer goods and services to achieve happiness, he saves less. When the government gets into the business of providing desired services, this disinclination to accumulate wealth is exacerbated by the individual's reaction to the tax effect of the process. What was formerly a personal expenditure becomes a government expenditure financed either immediately or ultimately by taxes, including taxes on those who would prefer to forego the expenditure. And, although it is the federal income tax that exasperates taxpayers and provides unlimited source material for standup comedians, mounting federal expenditures and rising federal taxes have been paralleled by increased expenditures and higher taxes at the state and local levels.²⁸ Tax dollars pay for such conventional services as police protection, but also support the intricate "income transfer" system²⁹ that includes such elements as Social Security³⁰ (both the traditional retirement and disability systems and the more recent supplementary income system), Aid to Families with Dependent Children, and food stamps.³¹

If one who has income sufficient to give a choice of saving or spending perceives himself (correctly or incorrectly) as being overburdened by taxes, unfairly saddled with an income transfer system, beset by inflation,³² and having less real income than he had a decade ago, he might choose to spend rather than save, especially if accumulated wealth would pass to those who "might not appreciate it anyway."

B. Demographic Changes

Americans now retired or approaching retirement are fortunate in this respect: A high proportion of the total population is of working age and is in the work force, and in particular, the numerous children of the "baby boom" following World War II are now helping to support the elderly while supporting themselves and their own families. But the population profile has changed and is still changing.³³ Although our total population continues to grow, persons are tending to live longer, and the fertility rate of American women has fallen. For some time to come we

28. *The Tax Mess*, NEWSWEEK, Apr. 10, 1978, at 70.

29. A. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* 67 (1975); Theobald, *The Background to the Guaranteed-Income Concept*, in *THE GUARANTEED INCOME* 83 (R. Theobald ed. 1965-66).

30. See generally A. MUNNELL, *THE FUTURE OF SOCIAL SECURITY* 25-61 (1977).

31. See generally SENATE SELECT COMMITTEE ON NUTRITION AND HUMAN NEEDS, 94TH CONG., 1ST SESS., *WHO GETS FOOD STAMPS?* 6-10 (Comm. Print 1975).

32. See Edgerton, *The Tax Reform You May Need Most*, MONEY, June 1978, at 48.

33. *The Graying of America*, NEWSWEEK, Feb. 28, 1977, at 50.

face a larger proportion of the old in the population, and a smaller proportion of the young. The numerous children of the baby boom who now help to support the elderly will themselves age and approach retirement, followed by a generation relatively less numerous and therefore relatively more burdened in supporting themselves, the old, and the young. The dependency ratio is now three to one, and it is likely to become two and one-half to one within a decade.

How will demographic changes and contemporary American living patterns affect the course of pension payments? Evidence accumulates that many pension plans are in a precarious state, and expectations of some present and prospective retired persons are unrealistic. The old may have less income than they had in their preretirement years, but they still have the vote, and ample time for organizing to use it effectively. In the future, if pension benefits are threatened, and the increasingly numerous old take political action, what is the likely response?

As long as we have prosperity, and the dependency ratio is favorable, the work force is likely to acquiesce in providing goods and services to the old in quantities sufficient to afford them something beyond mere subsistence. But the acquiescence might become grudging. Ours is a time of rising expectations. Provision by the work force for the dependent old and the dependent young requires those working to forego consumption themselves. Although an occasional "return to the soil" or to a simple, spare, uncomplicated existence receives attention from the media, there is no evidence that either is representative of contemporary American life. On the contrary, the emphasis is on living now and living well. To the extent that those in the work force perceive their own minimum needs as encompassing what their predecessors of a generation ago would have considered unnecessary and debilitating luxuries, provision for dependents old and young is likely to be affected adversely. If contemporary attitudes toward achieving the good life persist, and the dependency ratio becomes less favorable,³⁴ this adverse effect will simply become more pronounced.

V. IMPROVING THE WEALTH TRANSMISSION PROCESS

If significant segments of the population who previously used the law of wills, trusts, and future interests are unlikely to use it appreciably hereafter, how can we improve the contemporary system of wealth transmission that is displacing the traditional?

34. Until relatively recently, persons continued to work until death. The burden of supporting dependent persons could be alleviated by eliminating or modifying factors that produce retirement. Although there is a movement to eliminate most mandatory retirement, there is little evidence that that change alone will appreciably affect the trend toward "early" retirement. See Ross, *Retirement at Seventy: A New Trauma for Management*, *FORTUNE*, May 8, 1978, at 106; Scharff, *Will Delayed Retirements Put Your Promotion on Hold?*, *MONEY*, May 1978, at 93; *Now the Revolt of the Old*, *TIME*, Oct. 10, 1977, at 18.

A. *Pensions and Health Care Benefits*

First, we can try to assure that existing pension and health care plans, whether public³⁵ or "private,"³⁶ whether governmental or nongovernmental, whether fully funded or "unfunded," fulfill the purpose that is the only justification for their existence—providing benefits to the retired, the disabled, and to dependents of participants in plans.

Although governmental supervision of pension plan operation is frequently suggested as a means of assuring pension benefits, it is clear that reliance on government alone is in this connection illusory. Government might indeed be an enforcer, but government can also be a source of loss to pension funds. Any state legislator or member of Congress seeking funds to finance his favorite scheme for the improvement of the human condition can point to pension funds as a source of financing, no matter how precarious the security (if any) offered the beleaguered lender.

When the role of government as enforcer has been clearly established by law, the record of government as a supervisor of pension plan operation is poor. The influence of "the mob" over investments of Teamsters' pension funds is, for example, notorious. Yet four years after the passage of the Pension Reform Act of 1974, it is clear that mob influence has not been removed from Teamsters' pension fund operations.³⁷

The Pension Benefit Guaranty Corporation was created by the Pension Reform Act of 1974 to underwrite payment of benefits to beneficiaries of covered "private" pension plans that fail.³⁸ Although one cannot fault using the insurance device to mitigate the harshness of the loss of promised benefits, the Pension Benefit Guaranty Corporation is a palliative for a disease that is largely preventable. Some promises of future benefits are unrealistic when made: the promisor has neither the resources to pay pensions over an appreciable period of time to those "covered" employees at or approaching retirement age when the plan is adopted, nor the prospect of revenues sufficient to support pension payments to those employees retiring in years to come. It bears emphasis in this connection that the sweep of the Pension Reform Act of 1974 does not extend to all existing pension plans, and pension plans can be adopted that do not fall within the ambit of the Act.

If government is unreliable as an exclusive source of protection for pension funds, and the Pension Benefit Guaranty Corporation is an "after-the-loss" palliative administered at the expense of participants in success-

35. See generally R. TILOVE, *PUBLIC EMPLOYEE PENSION FUNDS* 168-73 (1976).

36. See generally *How Safe Is Your Pension Plan?*, U.S. NEWS & WORLD REP., June 12, 1978, at 78; Ehrbar, *Those Pension Plans are Even Weaker Than You Think*, FORTUNE, Nov. 1977, at 104.

37. *Teamsters Rebels Turn Up the Heat*, U.S. NEWS & WORLD REP., June 19, 1978, at 80; *The Teamsters and the Mob*, NEWSWEEK, Nov. 24, 1975, at 89.

38. PENSION BENEFIT GUARANTY CORPORATION, *CONTINGENT EMPLOYER LIABILITY INSURANCE: STATUS REPORT TO THE CONGRESS* 10-15 (July 1, 1978).

ful pension plans and stockholders, to whom or to what does the participant turn for assurance that the benefit promised him will in fact be paid?

The truth is that there is no one who can give such assurance. Viewed realistically, a claim to a pension or to health care benefits is a claim to such goods and services as are available for distribution from time to time. If there are no goods and services for distribution, the claim is worthless. If beneficiaries are denied equality of access to such goods and services as are available for distribution, the value of the benefit is diminished.

Although a person approaching retirement who has vested rights in a funded pension plan has a case for equality of access to goods and services that is legally and emotionally more attractive than that of his counterpart under an unfunded pension plan, both persons are in fact at the mercy of the work force. In this respect their situation is like that of minors and incompetents. They are heavily dependent on good will and prevailing notions of fairness. Effectiveness of the pension and health care devices turns in the long run on a consensus that the younger, productive segments of the population will support not only themselves but also the retired and the disabled. Yet many in the work force, preoccupied with trying to maintain themselves and improve their own position, are not particularly interested in the difficulties of pensioners even though they themselves are not far removed from retirement age.³⁹ Furthermore, because persons enter the work force every year, some who produce the goods and services available for distribution were unborn when an existing, functioning pension and health care plan was adopted. They may be ignorant of its original justification and resentful of the benefits it affords. In sum, a consensus existing in times of comparative prosperity may dissolve under the pressures of self-interest in times of adversity.

In the long run, the sources of assurance that pension and health care benefits will be paid are (1) awareness of the nature of the benefits, (2) continuing general acceptance of the notion that the work force will adequately support those who because of age or other disability cannot work, and (3) continuing scrutiny by participants of all devices (governmental or nongovernmental) intended to provide pensions and like benefits. Both understanding what benefits are, and effective continuing scrutiny of plans, require informed participants. Here, newspapers, periodicals, books, and television can play a part. And the quality of information afforded participants and the public, and the continuity of the flow of this quality information, can be improved by a sustained interest in such matters by the "third sector"—the charitable trusts and foundations sponsoring detached, scholarly inquiries into contemporary problems and institutions.

39. See Main, *Building a 21st-Century Pension Right Now*, MONEY, Sept. 1976, at 38.

B. *Avoiding Probate*

Devices to avoid probate are not new. They are rediscovered from time to time, and the list of devices is occasionally modified. Because avoiding probate is a continuing objective of countless persons, the legal problems associated with the process have been considered for years. Resolution of problems has been piecemeal. When public policy is clearly perceived, resolution tends to be clear cut. For example, devices intended to avoid probate carry no federal estate tax advantage. By way of contrast, the surviving spouse electing to take against the will might not be able to augment the estate for election purposes by including nonprobate assets because a jurisdiction simply prohibits such inclusion. There is lack of uniformity in this connection because public policy on protecting the surviving spouse has not been settled. Similarly, the position of creditors with respect to a tenancy by the entirety varies considerably, depending on the jurisdiction.

Clarification of the characteristics of devices to avoid probate is likely to proceed slowly. General public interest in clarification does not exist, and the interest of specialists, who can rarely spend full time on improving the law, is inevitably sporadic. Furthermore, the effort required to achieve consensus on the characteristics of devices is frequently deemed disproportionate to the benefits achieved. Therefore it is probable that the most that can be accomplished is discussion and settling of policy on an item by item basis. For example, if we agree that a revocable trust is testamentary for death tax purposes, we might be able to agree that it is testamentary for purposes of creditors' claims.

C. *Charity*

Charity needs protection from government⁴⁰ and protection by government. Charity needs protection from the ability of government to inhibit or destroy charity, and at the same time charity needs protection by government from fraud and abuse of charity.

Because of misuse of the charitable foundation device in the 1950s and 1960s, Congress by the Tax Reform Act of 1969⁴¹ enacted legislation⁴² that is largely defensible and beneficial, but that is in part unnecessarily punitive. Charity is a useful alternative to governmental action, and it has the sanction of long tradition in areas in which government has been at times hostile, ineffective, or indifferent. The punitive aspects of the Tax Reform Act of 1969 should not be used as prototypes for further legislation that in effect inhibits or destroys charity.⁴³ To a considerable extent, charity exists by grace of the tax laws, and tax laws are subject to change.

40. *Threat to an American Tradition*, TIME, May 22, 1978, at 96.

41. Pub. L. No. 91-172, 83 Stat. 487 (codified in scattered sections of 26 U.S.C. (1969)).

42. I.R.C. §§ 4940-4948.

43. See W. SMITH & C. CHIECHI, *PRIVATE FOUNDATIONS BEFORE AND AFTER THE TAX REFORM*

Because the identity of charitable objects shifts from time to time, and charity depends heavily on regular contributions from donors, both fund raising by charities and expenditure of funds by charities have been the source of abuse. It is in this connection that charities need protection by government, for government has or can create machinery for policing both fund raising and charitable expenditures.⁴⁴ Self-policing by charities assists, but cannot displace, policing by government because the more flagrant charity frauds are perpetrated by those who do not participate in self-policing.

However, just as government is unreliable as an exclusive protector of pension funds, so too is government unreliable as an exclusive protector of charity. As with pension funds, protection of charity depends in the long run on informed, interested, active contributors who pay attention to the disposition of their charitable contributions.

VI. CONCLUSION

Although the law of property, including the law of trusts, wills, future interests, and administration of estates, has a stability that is not shared by all other areas of law, it is error to assume that transmission of wealth from generation to generation in the last quarter of the twentieth century takes substantially the same form that it took in the first quarter of the century. The social, economic, and legal position of the rich is about the same now as it was then. But the transmission of wealth by the middle class has been deeply affected by the changing nature of the family, by the desire to avoid probate, and by the sharing of the burdens of dependency and disability. Sharing the burdens of dependency and disability entails an emphasis on groups rather than individuals, and the sharing has been made possible in large part by disagreeable taxation and controversial income transfers.

The desire to share burdens is firmly fixed, and we are not likely to abandon that desire. Nonetheless, successful sharing requires a consensus that it is worthwhile. The day-to-day cost of sharing burdens is borne by the work force, and the willingness of the work force to bear that cost turns on a perception that the cost (including that part attributable to waste and fraud) is not excessive.

Because the shift to new forms of property (principally "benefits") occurred over a relatively short period of time, it has been characterized by variety, abuse,⁴⁵ and disappointed expectations. But variety can be and is

ACT OF 1969 76-82 (1974); J. LABOVITZ, THE IMPACT OF THE PRIVATE FOUNDATION PROVISIONS OF THE TAX REFORM ACT OF 1969: EARLY EMPIRICAL MEASUREMENTS 76-78 (1974); Bittker, *Should Foundations Be Third-Class Charities*, in THE FUTURE OF FOUNDATIONS 132, 159-62 (F. Heimann ed. 1973).

44. See generally M. FREMONT-SMITH, FOUNDATIONS AND GOVERNMENT—STATE AND FEDERAL LAW AND SUPERVISION 272-408 (1965).

45. See *Congress Catches Up with Medicaid Ripoff*, U.S. NEWS & WORLD REP., Sept. 13, 1976, at 55.

a source of experimentation and improvement. Abuse of forms of property is a part of the history of property, but abuse can be controlled. Disappointment with the new forms of property is inevitable to the extent that expectations are unreasonable. The transmission of wealth from generation to generation on an individual basis has not proceeded altogether smoothly over a thousand years of Anglo-American experience. It is, therefore, hardly surprising that the transmission of wealth on a group basis and the ownership in common of some kinds of property have encountered difficulties.

The difficulties besetting our wealth transmission processes are not insurmountable; however, it is critical that they receive careful attention—particularly since their resolution has become politicized. The law of wills, trusts, and future interests is not dead. It is being displaced to a considerable extent by new law which developed quickly and imperfectly. We already have it. Our task is to make it work.